

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

JOHN M. MIDDLETON, INC. and  
JMTM, INC.,

Plaintiffs

v.

SWISHER INTERNATIONAL, INC.,  
Defendant

Civil Action No. 03-3908

**MEMORANDUM / ORDER**

May 31, 2006

Before the court are “Plaintiffs’ Motion and Memorandum of Legal Authority for Leave of Court to File Sur-Reply Brief in Opposition to Summary Judgment in Favor of Defendant, *Instanter*” (Docket # 97) and “Swisher International, Inc.’s Motion to Strike Section IV of Plaintiffs’ Reply Brief in Support of Rule 56(D) Summary Judgment Motion and Plaintiffs’ New Record Citations to Certain Statements of Facts” (Docket # 102).

Because the parties have previously agreed, and the court has previously ordered (*see, e.g.*, Stipulated Briefing Schedule (Docket # 49)), that no sur-replies are to be filed in connection with defendant’s motion for summary judgment, plaintiffs’ motion for leave to file a sur-reply (Docket # 97) will be denied.

Similarly, because Section IV of plaintiffs’ reply brief addresses defendant’s motion for summary judgment (which has already spawned a response from plaintiffs and

a reply from defendant), and not plaintiffs' cross-motion for summary judgment, it is effectively a sur-reply and must be stricken for the same reason that plaintiffs' motion for leave to file a sur-reply must be denied. Plaintiffs' "Response to Swisher's Statement of Facts in Further Opposition to Swisher's Motion for Summary Judgment" (Docket # 100) is also effectively a sur-reply, and it will be stricken.

However, I will decline to strike the additional record citations contained in plaintiffs' reply because it is in the interest of justice for the court to consider all relevant portions of the record, and, because I will also consider defendant's proposed responses (included in Exhibit 2 to defendant's motion), defendant will suffer no prejudice as a result of the belated submission of these citations.

For the foregoing reasons, it is hereby ORDERED that "Plaintiffs' Motion and Memorandum of Legal Authority for Leave of Court to File Sur-Reply Brief in Opposition to Summary Judgment in Favor of Defendant, *Instanter*" (Docket # 97) is DENIED. It is further ORDERED that "Swisher International, Inc.'s Motion to Strike Section IV of Plaintiffs' Reply Brief in Support of Rule 56(D) Summary Judgment Motion and Plaintiffs' New Record Citations to Certain Statements of Facts" (Docket # 102) is GRANTED only to the following extent: plaintiffs' "Response to Swisher's Statement of Facts in Further Opposition to Swisher's Motion for Summary Judgment" (Docket # 100) and Section IV of plaintiffs' reply brief are stricken. Defendant's motion is otherwise DENIED.

BY THE COURT:

/s/ Louis H. Pollak

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Pollak, J.